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IN THE

Supreme Court of the United States

October Term, 1959

No. 130

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Petitioner,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Lawyers Guild moves for leave to file a brief as amicus curiae.[1] This application is made because petitioner's brief is limited to a discussion of only two aspects of the case: (1) Whether 8 U. S. C. §1251 (a) (6) (C)[2] violates the Constitution by reason of being

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[1] While the time to file this brief has expired, it is believed that the importance of the issues justifies the granting of the motion.

[2] The warrant of arrest upon which the proceedings in this case are based was issued prior to the passage of Section 241 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 205, the section referred to in the petition and brief. Apparently these proceedings are based on Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, as amended by Section 1 of the Act of March 28, 1951, 65 Stat. 28, which was repealed by, but substantially reenacted in, the Immigration and Nationality Act of 1952, 8 U. S. C., Sec. 1251(a)(6)(C). In any event, the position urged in this brief would be equally applicable to Section 241(a)(6)(C) of the 1952 Act, and to Section 22 of the Internal Security Act. See *Niukkanen* v. *McAlexander*, 265 F. 2d 825, n. 1.

a bill of attainder (Petitioner's Brief, 7); and (2) Whether petitioner's alleged association with the Communist Party * * * was "meaningful" and "political" within the rule of *Rowoldt* v. *Perfetto*, 355 U. S. 115 (Petitioner's Brief, 3, 17).

Certiorari was sought and granted, however, upon the broader grounds of asserted unconstitutionality of the statute as violative of due process, as infringing the freedom of speech, and as being an *ex post facto* law (Pet. for Cert., 3, 5).[3] Since this Court's decision in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, and *Galvan* v. *Press*, 347 U. S. 522, extensive legal research, to be referred to and discussed in the appended brief, is believed to justify amicus curiae in urging a reconsideration of the constitutional issues underlying these two decisions, and the decision of the Court in *Carlson* v. *Landon*, 342 U. S. 524. Counsel believe it can be demonstrated that, while broad and sweeping language has been used by the Court on occasion to uphold the exclusion and deportation of aliens in particular cases, and while it has been suggested that the power of Congress with respect to the deportation of aliens is unlimited except for the requirements of procedural due process, the asserted power of *banishment*,[4] as distinguished from the power of *delayed exclusion*, *i.e.* "ejection", is of relatively recent origin.

Counsel further believe that the appended brief may be of assistance to the Court in considering the question

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[3] See *Niukkanen* v. *Boyd*, 241 Fed. 2d 938 (9th Cir. 1957), affirming without opinion 148 Fed. Supp. 106 (D. C., Ore. 1956); cert. den. 355 U. S. 905.

[4] "Banishment", as here used, is intended to refer solely to the expulsion of the lawfully admitted long term resident alien as distinguished from the expulsion of an alien who either entered illegally, or who, within a reasonable time after entry, committed acts justifying a conclusion that his entry was erroneously permitted. The latter situation is hereinafter termed "ejection".

of whether the expulsion of a long term lawfully admitted alien—banishment—is punishment. While the constitutional implications of this question are raised by petitioner in the discussion of what constitutes a "bill of attainder" (Petitioner's Brief, 14), it is believed that the appended discussion may be of additional assistance to the Court.

The correct constitutional determination of the issues presented upon this petition are of importance not only to the millions of lawfully admitted permanent resident aliens, but also, and perhaps primarily, to the nation as a whole in its relationship to the world family of nations. Banishment is "universally decried by civilized people", *Trop* v. *Dulles*, 356 U. S. 86, 102 (opinion of Warren, C.J.). While the position here sought to be presented by amicus curiae is a constitutional position, not a policy question, the results of the determination may be far-reaching. Certainly the importance of this issue justifies a reconsideration of the *Carlson*, *Harisiades* and *Galvan* cases.

The National Lawyers Guild, a national bar association particularly concerned with the preservation and extension of constitutional civil liberties, is concerned that in an area where basic human rights and the disposition of human lives are deeply involved, the most searching constitutional analysis should be applied and reapplied to a procedure which repeatedly produces results universally recognized as inhumane, harsh, brutal and shocking.

For these reasons the National Lawyers Guild moves for leave to file the following brief as amicus curiae.[5]

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[5] The written consent of petitioner to the filing of this amicus brief has been obtained. The consent of respondent has been denied by letter, a copy of which *amicus curiae* is filing with this brief.

BRIEF OF *AMICUS CURIAE*

Preliminary Statement of the Case

Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, provides for the deportation of any alien who at any time has been a member of the Communist Party. Petitioner entered the United States in 1909 at the age of ten months. He has resided in this country continuously since his entry. He had brief but honorable service in the United States Army during the Second World War. He is the head of a family consisting of his citizen wife and her sixteen year old son by former marriage. (*Niukkanen* v. *McAlexander*, 265 F. 2d at 826).

After an administrative hearing in deportation proceedings commenced in 1952, a special inquiry officer determined that he was deportable as one who had been a member of the Communist Party during the years 1937 to 1939 (265 Fed. 2d at 826). Petitioner, testifying in his own behalf, categorically denied that he had ever been a member of the Communist Party. However, in the view of the Court below "the evidence more than meets the minimum requirements of proof to establish Communist Party membership * * *" (265 Fed. 2d at 829).

POINT I

Application of the statute has resulted here in a judgment of banishment against petitioner, which exceeds the inherent constitutional limits of the power to expel.

While it has been said the "Government's power to terminate its hospitality has been * * * sustained by this Court since the question first arose," *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 587, a careful analysis of the cases

relied on in that case,[6] taking into consideration their particular facts, the historical and statutory setting in which they arose, the contentions advanced by the parties, and the issues which divided the Justices in their determination, reveals that in each such case, the Court was dealing with what was, in effect, "delayed exclusion". That is, the alien was ejected upon determination of facts which showed, or which were conclusively presumed to show, that his habits, characteristics, conditions, or circumstances as at the time of entry, or the manner of his entry, would have, if known at the time, justified exclusion.

Thus in *Fong Yue Ting* v. *United States*, 149 U. S. 698, a Chinese was deported because he had not complied with a condition imposed on the entry of Chinese, namely, that they obtain certificates of residence.

Lem Moon Sing v. *United States*, 158 U. S. 538, was an exclusion case.

Li Sing v. *United States*, 180 U. S. 486, involved a Chinese whose entry was fraudulent.

Fok Young Yo v. *United States*, 185 U. S. 296, The *Japanese Immigration* Case, 189 U. S. 86, and *United States* v. *Ju Toy*, 198 U. S. 253, were also exclusion cases.

In *Zakonaite* v. *Wolf*, 226 U. S. 272, *Tiaco* v. *Forbes*, 228 U. S. 549, and *Bugajewitz* v. *Adams*, 228 U. S. 585, the basic question was not reconsidered, in different terms.

Indeed, when the first case arose which might properly be considered a deportation case, *Pearson* v. *Williams*, 202 U. S. 281, the order was sustained solely on the theory that the original entry was only conditional and could be revoked on a showing that the alien never should have been admitted. It is significant that nowhere in Justice Holmes' opinion in that case does he rely on the general power to banish.

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[6] These are cited in footnote 11, 342 U. S. 587.

Moreover, such analysis indicates that the constitutional delegation of power believed to sustain deportation statutes was implied from the power to exclude; and that the power to exclude derived primarily from the express delegation of power to regulate commerce with foreign nations. *Ekiu* v. *United States*, 142 U. S. 651, 659.

Thus, just as Congress has the power to maintain control over the importation of goods prior to their merging with the domestic economy, *Hilton* v. *Merritt*, 110 U. S. 97, so also it had "the power to retain control over aliens *long enough to make sure of the facts.*" *Keller* v. *United States*, 213 U. S. 138, 149-50 (dissenting opinion of Mr. Justice Holmes; emphasis added).

The essence of the position here presented is set forth in the opinion in *Keller*, just referred to, and which is quoted at some length to provide an understanding of Mr. Justice Holmes' true position.

> "For the purpose of excluding those who unlawfully enter this country Congress has power to retain control over aliens long enough to make sure of the facts * * * To this end *it may make their admission conditional* for three years * * * If the ground of exclusion is their calling, practice of it within a short time after arrival is, or may be, made evidence of what it was when they came in. Such retrospective presumtions are not always contrary to experience or unknown to the law * * * If a woman were found living in a house of prostitution within a week of her arrival, no one, I suppose, would doubt that it tended to show that she was in the business when she arrived. But how far back such an inference shall reach is a question of degree like most of the questions of life. And, while a period of three years seems to be long, I am not prepared to say, against the judgment of Congress, that is too long.
>
> "[I]t is fair to observe that the presumption * * * is not open to rebuttal. I should be prepared to accept even that, however, in view of the difficulty of proof in such cases. Statutes of which the justifi-

> cation must be the same are familiar in the States. * * * It is true that * * * [ordinarily] in such instances the legislature has power to change the substantive law of crimes, and it has been thought that when it is said to create a conclusive presumption as to a really disputable fact, the proper mode of stating what it does * * * is to say that it has changed the substantive law. * * * This may be admitted without denying that considerations of evidence are what lead to the change. And if it should be thought more philosophical to express this law in substantive terms, I think that Congress may require, as a condition of the right to remain, good behavior for a certain time, in matters deemed by it important to the public welfare and of a kind that indicates a preexisting habit that would have excluded the party if it had been known. * * * "

We submit that the position outlined by Mr. Justice Holmes in *Keller* correctly and succinctly defines the proper source and limit of Congressional power. Most of the actual deportations which have been approved in this Court are consistent with this "conditional entry" principle, although the statutes upon which they have been based and the Court's language in sustaining them have tended to blur and obscure the constitutional source of the power to deport. Only in recent decisions has the Court approved actual *banishment*: that is, the expulsion of a lawfully admitted permanent resident alien for causes which cannot be rationally related to circumstances or conditions which may be presumed to have existed at or prior to entry.[7]

Harisiades and *Galvan* were the first and last decisions of this Court to approve banishment in the face of a constitutional challenge. Thus, while the language of previous

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[7] *Costanzo* v. *Tillinghast*, 287 U. S. 341, was the first of the decisions in which the Court clearly upheld banishment, in the sense that Costanzo had entered as a child. He was deported for operating a house of prostitution as an adult. "A claim of violation of constitutional rights made in the court below (was) * * * abandoned." 287 U. S. at 342.

decisions seems consistent with the opinions in those cases, the ultimate decisions are a significant departure in fact, if not in theory, from previous decisions of the Court.

A re-examination of the source and limits of the constitutional power sought to be exercised in the expulsion of lawfully admitted, permanently resident aliens should be undertaken by this Court. The application of the "conditional entry" theory of the constitutional power to deport would reaffirm the full control of Congress over the immigration, and recognize power to remove those entrants who, within a reasonable time after entry are found to be undesirable. At the same time, the shocking brutality of banishment of lifetime resident aliens will be prevented.

The demonstration of what is believed to be this gradually developed, but now fully matured error as contrasted to the position of Mr. Justice Holmes has been the subject of research and analysis on the part of one of the signatories of this brief, involving several years. This has been, and is being published in a recent and the forthcoming issue of Yale Law Journal under the title, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien.*[8] Forty reprints of the article will be available as soon as the December issue of the Yale Law Journal is printed, and they will be submitted to the Clerk to be incorporated by reference as a part of this brief.

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[8] Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*: The Pre-1917 Cases, 68 Yale L. J. 1578, which will hereinafter be cited, Hesse, The Pre-1917 Cases, 68 Yale L. J. 1578; and Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 Yale L. J. —, to be published in December, and which will hereinafter be cited as Hesse, The Inherent Limits of the Power to Expel.

POINT II

Deportation of a lawfully admitted permanent resident alien for conduct having no relationship to any circumstance of his entry, or to his condition, habits, or character at the time of entry, in fact constitutes punishment?

Such deportation has been described as harsh, cruel and inhumane as any punishment practiced in a civilized nation. *U. S. ex rel. Klonis* v. *Davis*, 13 F. 2d 630, 631 (2nd Cir., 1926). The applicability of Article 1, section 9 of the Constitution, prohibiting *ex post facto* laws, and bills of attainder, and of the Eighth Amendment, prohibiting cruel and unusual punishment, is to be determined by the nature and relationship of the sanction imposed to the end sought to be accomplished; *i.e.*, whether regulatory and compensatory, or primarily punitive. *United States* v. *Lovett*, 328 U. S. 303; cf. *Speiser* v. *Randall*, 357 U. S. 513.

At least in the case of those ordered deported for conduct not shown to be anything but innocent when engaged in, cf. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 244-46, but retrospectively proscribed, and those who by reason of virtual lifetime residence are aliens only by "legal imputation", (Judge Learned Hand) *U. S. ex rel. Mignozzi* v. *Day*, 51 Fed. 2d 1019, 1021 (2nd Cir., 1931) the legal fiction, that banishment is not punishment, should be discarded in the face of the brutal reality that punishment without judicial trial, punishment for past innocent conduct, and the cruel punishment of permanent exile, are inconsistent with Article I, section 9, of the Constitution, and with the Eighth Amendment.

The Justices of this Court have on many occasions recognized deportation as in fact a punishment or penalty equivalent to banishment and exile: "* * * [Deportation] is undoubtedly a harsh sanction that has a severe penal effect. * * *" *Trop* v. *Dulles*, 356 U. S. 86, 98 (Chief Jus-

tice Warren); "To banish [aliens] from home, family, and adopted country is punishment of the most drastic kind. * * *" *Lehmann* v. *United States*, 353 U. S. 685, 691 (Mr. Justice Black)." * * * [The] intrinsic consequences of deportation are * * * close to punishment for crime. * * *" *Galvan* v. *Press*, 347 U. S. 522, 531 (Mr. Justice Frankfurter). "* * * [A] life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens * * * is a savage penalty." *Jordan* v. *DeGeorge*, 341 U. S. 223, 243 (Mr. Justice Jackson). "* * * [The] doom of deportation * * * in the case of those whose lives have been intimately tied to this country * * * [requires, in the case of an ambiguous statute, that] permissible construction consonant with humane considerations". *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, 533-4 (Mr. Justice Frankfurther). "* * * [Deportation] may result * * * in loss of both property and life; or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (Mr. Justice Brandeis).

Judge Learned Hand in *DiPasquale* v. *Karnuth*, 158 F. 2d 878, 879 (2nd Cir. 1947), stated that the deportation of one who "had come here as a boy" * * * was "in substance [exile]". In *United States ex rel. Klonis* v. *Davis*, 13 F. 2d 630, 631, he said, "Deportation [whether the alien came here in arms or at the age of ten] is to him a dreadful punishment, abandoned by the common consent of all civilized people * * * [That] our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result should be a national reproach."

President Truman's Commission on Immigration and Naturalization included in its report a section entitled "Deportation as Punishment", stating in part, "In 1910 a statute was passed sanctioning the expulsion at any time of an alien identified with the business of prostitution.

Eventually the concept of deportation as punishment spread rapidly; today it is predominant in the deportation statutes." *Whom Shall We Welcome*, 200 (1953).

Notwithstanding such continued recognition that deportation when it amounts to banishment is a cruel and inhuman (if, unfortunately, not sufficiently unusual) punishment, the Court has upheld such banishments four times in the past eight years in the face of the contention that the action constituted attainder, an *ex post facto* law, and cruel and unusual punishment. *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Galvan* v. *Press*, 347 U. S. 522; *Marcello* v. *Bonds*, 349 U. S. 302; *Lehmann* v. *United States*, 353 U. S. 685.

In these cases the right of "Congress to legislate retrospectively" in non-criminal matters (*Lehmann*) is described as an "unbroken rule of this court" (*Harisiades*) "which has been followed from earliest times" (*Galvan*). The precedent cases which are said to close the issue, *Bugajewitz* v. *Adams*, 228 U. S. 585, 591, and *Mahler* v. *Eby*, 264 U. S. 32, 39,[9] will not sustain the weight thus thrust upon them.

While *Bugajewitz* has been frequently cited as authority for the proposition that Article I, Section 9 of the Con-

[9] Mr. Justice Jackson in *Harisiades*, 342 U. S. at 59[illegible] n. 22, also cited *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730 and *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, Mr. Justice Frankfurter in *Galvan*, 347 U. S. at 532, cited *Ng Fung Ho* v. *White*, 259 U. S. 276, 280, and Mr. Justice Whitaker in *Lehmann* cited, in addition, *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, *Harisiades*, *Galvan* and *Marcello* v. *Bonds*, 349 U. S. 302. Apparently *Fong Yue Ting*, *Bilokumsky* (involving a presumption of alienage from silence at a deportation hearing) and *Ng Fung Ho*, were cited as authority that deportation proceedings are civil in character. The only other pre-*Harisiades* case cited, *Eichenlaub*, was decided without reference to the "ex post facto" clause, but as previously noted, the dissenters, including Mr. Justice Frankfurter, refer to deportation in terms of punishment.

stitution has no application to deportation laws *generally*, it is, to say the least, questionable authority for that proposition. The warrant of arrest in *Bugajewitz* recited that "she was then [August 3, 1910] a prostitute and inmate of a house of prostitution, and that she was a prostitute at the time of entry, and entered the United States for purpose of prostitution, or for immoral purpose". 228 U. S. at 590. Her answer denied that she was a prostitute at the time of entry or that she entered to practice prostitution. Apparently, the question of an *ex post facto* application of the Act of March 26, 1910, was not raised by counsel for Bugajewitz. The constitutional question, which counsel attempted unsuccessfully to reopen, was whether Congress could delegate to administrative officers the authority to make determination of facts which if established would constitute a crime, or whether such determination must be made by the "judicial power". 57 L. Ed. 978, 979. The discussion as to whether the Act of March 26, 1910, was *ex post facto* legislation as applied to appellant, not raised by her counsel, was actually raised *by the Government instead*. *Johannessen* v. *United States*, 225 U. S. 227, 242, and *Fong Yue Ting*, *supra*, were cited as authority for the proposition that as applied the statute had no retrospective effect.

Since *Johannessen* was a denaturalization case involving citizenship obtained by fraud through false representations as to length of residence, and since *Fong Yue Ting* on its facts involved only the mode of proving legal entry the statement that "the prohibition of *ex post facto* laws * * * has no application * * * and with regard to petitioner, it is not necessary to construe the statute as having any retrospective effect", could well indicate that Bugajewitz was viewed by Mr. Justice Holmes as an "erroneously admitted alien", subject to ejection because of habits or characteristics present, but not discovered, at the time of entry.[10]

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[10] Hesse: Pre 1917 cases, 68 Yale L. J. 1578, 1621-25.

The other pre-*Harisiades* case involving the application of the "ex post facto" prohibition to deportation, *Mahler* v. *Eby*, 264 U. S. 32, was decided in favor of the alien's right to remain in the United States. However, the Court's opinion upheld the validity of the act which authorized deportation of aliens found to be "undesirable residents" as persons convicted under the Espionage Act in effectuating removal for war time acts.

In any event, these two cases, neither of which involved banishment, and one of which involved a prostitute of a little over five years residence, and the other a war measure, do not hold the broad and persuasive authority assigned to them in *Harisiades* and *Galvan*. Certainly they are not authority to authorize the banishment of a lifetime resident alien in the face of constitutional inhibitions against punishment by an *ex post facto* law, a bill of attainder, or by cruel and unusual measures.

Even if the question of whether the *ex post facto* prohibition applies to non-criminal laws is closed,[12] and even if this clause is not applicable to a deportation statute which inflicts punishment retrospectively on conduct innocent at the time it occurred, such a construction can not logically be placed upon the prohibition against bills of attainder. The essence of a bill of attainder is that it inflicts punishment upon a named individual, or upon an easily ascertainable group without judicial trial.[13] As the subject has been dealt with by petitioner, we are not here developing it further.

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[11] Hesse: Pre 1917 cases, 68 Yale L. J 1578, 1584-86. Hesse: The Inherent Limits of the Power to Expel, 69 Yale L. J. text at notes 44 to 47.

[12] But see the dissenting opinion of Mr. Justice Douglas in *Marcello* v. *Bonds*, 349 U. S. at 319-20.

[13] See *The Constitutional Prohibition of Bills of Attainder: A Waning Guaranty of Judicial Trial*, 63 Yale L. J. 844.

The "fact of punishment" unconstitutionally inflicted in the guise of civil sanctions was recognized in *Speiser* v. *Randall*, 357 U. S. 513, where a taxpayer was required to execute an expurgatory oath in order to avoid paying a higher rate of taxes than those taking the oath. The Court held the statute in question violative of due process, by enforcing on the taxpayer the duty of proving himself "not guilty." Compare *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.

Similarly, an applicant for admission to the Bar may not consistent with due process be prevented from practising his profession solely, or primarily, because of his membership in the Communist Party some twenty years earlier from 1934 to 1939 where the record is barren of any evidence that such membership constituted more than an unorthodox political faith. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 244 to 246. Evidence of such past membership cannot justify the sanction of a conclusive presumption of bad moral character, so as to deny to an applicant the right to practice law. *Konigsberg* v. *State Bar of California*, 353 U. S. 252. The statutes and rules construed in these cases were not tested against Article I, section 9, of the Constitution, but rather against the due process clause of the Fourteenth Amendment. The path taken to reach the result is, however, strikingly similar to that involved in *Cummings* and *Garland*. In all cases where a right or privilege is withdrawn, or to be withdrawn, because of past conduct asserted to justify such sanction without judicial trial, shifting the burden from the Government to the one asserting the right or privilege, the result is punishment and the legislation invalidated.

Where the regulatory element of the sanction invoked is minimal, where the penalty is maximal, as it always is in cases of banishment, and especially where the conduct sought to be penalized was non-culpable when it occurred, the fact of punishment should be recognized. The protec-

tion of the constitutional prohibitions against such punishment should be invoked on behalf of the alien to protect him from the rigors of a fluctuating legislative policy which subject him to cruel and inhuman punishment for non-culpable conduct which occurred long in the past.

Article 1, section 9, and the Eighth Amendment, should prevent petitioner's banishment from his real home and an enforced exile in an alien land.

CONCLUSION

It is respectfully submitted that the judgment of the lower court be reversed.

Respectfully submitted,

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